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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DELANO EDWARDS,

Defendant and Appellant.

D073819

(Super. Ct. No. SCD274199)

APPEAL from orders of the Superior Court of San Diego County,

Michael S. Groch, Judge. Affirmed in part; remanded with directions.

Aurora Elizabeth Bewicke, by appointment of the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

James Delano Edwards pled guilty to felony child abuse and driving under the influence of alcohol and was sentenced to four years of formal probation and 365 days in local custody. The court also issued a criminal protective order to protect the victim, his girlfriend's minor daughter Y.T., and it ordered similar no contact probation conditions.¹ Edwards challenges the criminal protective order and the related conditions of probation. He raises two arguments here. First, he contends the court exceeded its authority when it issued the protective order pursuant to Penal Code section 136.2, subdivision (i)(1).² Second, he claims ineffective assistance of counsel on the basis of his specially-appearing counsel's failure to object to the conditions of his probation related to contact with Y.T.

Having reviewed the applicable law and record before us, we find Edwards's ineffective assistance of counsel claim unpersuasive and therefore decline to disturb the probation conditions. However, Edwards's concerns regarding the factual findings providing for the protective order are well founded. Because the court failed to make any explicit or implicit findings regarding domestic violence sufficient to provide for a criminal protective order under section 136.2, subdivision (i), we remand for clarification.

¹ We refer to the victim as Y.T., intending no disrespect.

² All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

At about 3:00 a.m. on October 22, 2017, Edwards drove into a blocked-off crime scene and onto a curb in the median, disregarding four police officers' orders to stop the vehicle. He then quickly accelerated and fled from the scene. After pursuing the vehicle and conducting a traffic stop, the officers identified the odor of alcohol inside the vehicle and found both Edwards and one passenger—his girlfriend's daughter Y.T.—intoxicated.³ Y.T. was 13 years old at the time and naked from the waist down.

Edwards responded to questions from the officers and denied any sexual contact with Y.T., but he offered several different, inconsistent reasons for Y.T.'s state of undress. Ultimately, he told the officers that whatever Y.T. had told them was the reason. At the scene, Y.T. first claimed that she had needed to urinate at the side of the road. Later, she told an investigator that she was too intoxicated to recall whether anything happened or why her clothing had been removed.

Shortly thereafter, the San Diego County District Attorney charged Edwards with felony child abuse (count 1; § 273a, subd. (a)), driving under the influence of alcohol, and refusing to submit to a chemical test (count 2; Veh. Code, §§ 23152, subd. (a), VC23577), and resisting an officer (count 3; § 148, subd. (a)(1)). On the same day that it charged Edwards, the prosecution also requested a criminal protective order to protect Y.T., which the court issued. Because Y.T. and his girlfriend live with Edwards, the

³ Analysis of his blood sample revealed Edwards had a blood alcohol content level of .107 percent, and an open 24-ounce alcoholic beverage was found between the front and rear passenger seats.

order impacted his family. A few weeks later, Edwards agreed to a plea deal. He pled guilty to counts 1 and 2 and signed a "*Harvey* waiver," permitting the sentencing court to consider his "prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases when granting probation . . . or imposing sentence." (See *People v. Harvey* (1979) 25 Cal.3d 754.) In exchange, count 3 was dismissed, and the prosecution did not oppose local custody time.

In January 2018, the court was set to conduct Edwards's sentencing, but ended up continuing the hearing to February so that Edwards could submit to a probation interview. During the short proceedings in January, however, Y.T.'s mother addressed the court regarding the no contact order. She spoke for herself and her daughter because she said her daughter did not feel comfortable addressing the court herself. The mother asserted that "[w]e would like it lifted." The court noted that it would be willing to hear from Y.T. again at sentencing if she desired.

During the February sentencing hearing, the court heard from both parties regarding the probation condition prohibiting contact with the victim and her family. The court also heard from Edwards via a handwritten letter, which the court discussed at the hearing and which addressed "some of the issues that have already been before the court and parties regarding contact between [Edwards] and his family." The court rejected the parties' proposed plea deal, finding it too lenient. Edwards was given the choice of accepting the court's proposed modification or withdrawing his plea. Edwards accepted the modification, and the court sentenced Edwards to a combined four-year term of supervised probation for both counts 1 and 2, with a term of 365 days in county jail,

including no contact conditions parallel to the terms of the previously issued criminal protective order. The court terminated the prior protective order and entered a new criminal protective order for a four-year term.

DISCUSSION

A. *The Criminal Protective Order*

Edwards challenges the criminal protective order in two ways. He first argues that the court's order was unauthorized given that the court selected the order titled "Criminal Protective Order—Other Than Domestic Violence" (Judicial Council form No. CR-161), and "other than domestic violence" criminal protective orders are limited to circumstances indisputably not present here. He also contends that the court erred in issuing the order because it did not state or imply any factual findings regarding domestic violence. And even if the court had done so, he claims that substantial evidence would not support a finding that the child endangerment to which Edwards pled guilty amounts to domestic violence as defined in section 136.2, subdivision (i)(1).

The People do not attempt to justify the court's order on a nondomestic violence theory. In effect, they concede the wrong form was used. Instead they contend that the court's authority is not limited by the title of the form used and that, irrespective of whether the court used the form No. CR-161 (Criminal Protective Order—Other Than Domestic Violence) rather than form No. CR-160 (Criminal Protective—Domestic Violence), nothing of a substantive nature included in the actual order was affected in any way by what they deem a clerical error in selecting the proper form. The same terms and conditions that were statutorily authorized and ordered here could also have been

included on the form that should have been used, CR-160. The People further assert that by pleading guilty to "felony child abuse of [Y.T.] in violation of section 273a, subdivision (a)," Edwards's conviction qualified as a crime of domestic violence under Family Code section 6211.

We agree with the People that the order was not necessarily unauthorized merely because the wrong form was used for the protective order. The error in the form's title was not related to any judicial determination, and it did not have any substantive effect on the resulting terms and conditions imposed. (See, e.g., *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1273; *People v. Trotter* (1992) 7 Cal.App.4th 363, 369.)

The real questions here are whether the court intended to impose a "domestic violence" protective order under section 136.2, subdivision (i)(1) and, if so, what facts it found to support it. To enter a protective order under the statute on domestic violence grounds, the court must find that "a criminal defendant has been convicted of a *crime involving domestic violence . . .*" (*Ibid.*, italics added.) The statute incorporates section 13700 of the Penal Code and section 6211 of the Family Code as bases for determining which crimes involve domestic violence. Section 6211 of the Family Code defines "domestic violence" as "abuse" committed against any of several categories of individuals, including family members, romantic partners, and cohabitants, among others. For the purposes of that section, "abuse" is defined at Family Code section 6203, subdivision (a) as, among other things, "sexual assault" and/or any of the actions that may be enjoined under Family Code section 6320, including molestation. (See *People v.*

Phillips (2010) 188 Cal.App.4th 1383, 1393 [molestation]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1751 [same].)

Here, there is nothing one way or the other to indicate whether this was simply a mistake by the court in choosing the correct form. It made no findings—express or implied—regarding domestic violence. And somewhat rebutting the suggestion of a clerical error, it used the same apparently-mistaken form for both the pretrial protective order as well as the post-conviction criminal protective order.

Under these circumstances, we cannot analyze the sufficiency of the evidence to support the order on the basis of an implied finding of domestic violence that the court never made. We instead adopt Edwards's suggestion and remand for clarification of the factual basis for the criminal protective order pursuant to section 136.2, subdivision (i). If the court intended to impose a domestic violence protective order, it should explain on what basis it concluded that Edwards was "convicted of a crime involving domestic violence" within the meaning of the statute.

B. *Edwards's Counsel Was Not Ineffective in Failing to Object to the No Contact Probation Conditions.*

According to Edwards, his specially-appearing counsel's failure to object to the no contact probation conditions amounts to ineffective assistance of counsel. He claims that because his own child and girlfriend reside with Y.T., counsel should have argued that the no contact probation conditions ought to have been more narrowly-tailored. The People maintain that counsel's performance was neither deficient nor prejudicial.

To show ineffective assistance of counsel, a defendant must prove: (1) deficient performance by counsel under an objective standard of professional responsibility; and (2) a reasonable probability that but for counsel's errors a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*); *People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).) Where such a claim is made on direct appeal, rather than in the context of a habeas corpus proceeding, it can succeed "only if there is affirmative evidence that counsel had ' " 'no rational tactical purpose' " ' for an action or omission." (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

Under the Fourteenth Amendment, Edwards has a clear constitutional liberty interest in being permitted to live with and visit his child. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 752–756.) His interest is compelling—the Constitution protects the sacred bonds of family "precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 503; see also *Obergefell v. Hodges* (2015) 576 U.S. ____ [135 S. Ct. 2584, 2594–2595].) But the important constitutional liberty interest in the preservation of family must sometimes yield, including in situations like these, where a defendant has committed an egregious crime against his girlfriend's daughter and the court has properly considered the liberty interest at issue in tailoring its order.

Regardless, Edwards's ineffective assistance of counsel claim fails for futility. (See *Strickland*, *supra*, 466 U.S. at pp. 687, 694; *Holt*, *supra*, 15 Cal.4th at p. 703.) Given the court's rejection of the first plea deal, its reluctance to grant probation, and its

ability to consider the entirety of the factual circumstances for the probation order authorized by the terms of the plea deal, there is no reasonable likelihood that if counsel had objected, a more favorable determination would have resulted. Furthermore, as Edwards notes, section 273a directs that, if the court grants probation, it should include, "if appropriate, residence exclusion or stay away conditions," subject to an "interests of justice" exception. (§ 273a, subd. (c)(1), (c)(5).) On this record, the court had ample reason to tailor both orders to protect the victim, even to the detriment of Edwards's interest in being permitted to live with and visit his family, and any request to the contrary would have been futile. As the court described at the preliminary hearing, there was a "very, very significant risk and endangerment to [Y.T.] . . . supported by the testimony and information before the court." Moreover, rather than make Edwards's proposed objections, counsel may have reasonably considered that a better tactical approach would be to lay the groundwork for a request to modify the award, which appears to be precisely what the specially appearing counsel successfully accomplished.⁴

⁴ "[Counsel:] [Edwards] can still have contact with the mother and that if they want to begin healing and creating a family unit . . . then that can be readdressed and that's not closed off to him forever.

"[The Court:] Thank you. I will sign the protective order, and it can be readdressed in the future if there's reason to think that that's the appropriate order. The minor will be older, hopefully the defendant will have some coursework under his belt, so he's not foreclosed from asking the court or the victim's not foreclosed from asking the court in the future to modify it. But until then, the criminal protective order will be in place. "

DISPOSITION

The criminal protective order is vacated and the matter is remanded to the trial court for clarification of the factual basis for any protective order the court decides to issue pursuant to section 136.2, subdivision (i). In all other respects the judgment is affirmed.

DATO, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.